good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground on which their wishes can safely be carried out."

K. N. L.

GRIST FROM THE LAW MILLS

Indicative of a certain trend[1] of decisions in Equity is *Stark v. Hamilton* (1919, Ga.) 99 S. E. 861, in which the defendant, who had debauched the plaintiff's minor daughter, was restrained from longer associating with or communicating with her. No property right was involved, except the technical right of the father to the services of his minor child, and it was frankly recognized that the real injury lay in the humiliation of the father and the damage to the reputation of the family. The court, however, felt no obstacle either in the absence of precedent or in the novelty of incident, and was content to say that the protection of property should not be placed above similar protection of personal rights. With this statement no one will quarrel. Undoubtedly the dogma, "Equity protects only property rights," must be abandoned;[2] in the past it has been invoked to cover a palpable miscarriage of justice.[3] But as the pendulum swings in the other direction, must we not pause to consider the expediency of the *exercise* of jurisdiction, the *existence* of which may be conceded? That is the real problem in the present case. Unfortunately it received no consideration.[4]

There is much to be said for the distinction sometimes made between artful knaves and guileless fools, even in civil suits where the fool is seeking recovery of the shekels of which he has been mulcted in some illegal game.[5] Certainly the distinction is well taken when the subject of it is a defendant accused of a crime in which intent is a vital factor. In *Crane v. United States* (1919, C. C. A. 9th) 259 Fed. 480, the defendant had been convicted of using the mails in a fraudulent scheme to obtain money. He was the prophet of a new religion; he was the one man who could exorcise (by absent treatments) the thirteen devils who produce human misery; and he could be persuaded to accept pecuniary offerings when that service had been

---

[1] *Cf. Vanderbuilt v. Mitchell* (1907, Ct. Err.) 72 N. J. Eq. 910, 67 Atl. 97; *Ex parte Warfield* (1899) 40 Tex. Cr. App. 413, 50 S. W. 933.

[2] *Cf. Pollard v. Photographic Co.* (1888) 40 Ch. D. 345, 354.

[3] *E. g. Hodecker v. Stricker* (1896, Sup. Ct.) 39 N. Y. Supp. 515; *Roberson v. Rochester Folding Box Co.* (1902) 171 N. Y. 538, 64 N. E. 442.

[4] The authorities are collected and carefully examined by Dean Pound in a notable article, Equitable Relief Against Defamation and Injuries to Personality (1916) 29 HARV. L. REV. 640.

[5] See (1919) 27 YALE LAW JOURNAL, 1090.

performed. The instruction which the appellate court upheld stressed the defendant's good faith as the crux of the case. There is every reason to commend the ruling; if the defendant was an artful knave, we are well rid of him. But no reason appears why one *bona fide* fool should not without criminal liability give another thought "treatments"—at sufficient distance—for devils or for anything else; even for pay, if they so agree.[6] It is perhaps a question whether such thought, being paid for, may fairly be dubbed "free"; but surely it falls within that freedom of thought with which the law seeks not to interfere.[7]

Give some doctrines rope enough and they will hang themselves; the trouble is that they tangle up the law considerably in the process. Under the law merchant no consideration was necessary to support the promises on a negotiable instrument. When the common law undertook to force into negotiable instruments its own rules on consideration, there was, for a time, confusion. Finally, with the aid of presumptions, some *prima facie,* some "conclusive," and with certain wrenchings and strainings in the matter of antecedent debt, a set of rules crystallized out of the chaos which, although anomalous, was reasonably clear cut and workable. Suddenly, with the Negotiable Instruments Law, a new factor was injected into the calculation. "The validity and negotiable character of an instrument are not affected by the facts that it . . . bears a seal."[9] This makes sealed notes negotiable; necessarily it abrogates all common-law rules inconsistent with such negotiability. But does the section make it possible, by adding a seal to the maker's signature—(together, possibly, with a recital thereof)[10]—to create a note enforceable by an immediate party, regardless of consideration or duress? That it does, is the doctrine of *Kennedy v. Collins* (1919, Del. Super. Ct.) 108 Atl. 48. It has been currently thought that the only reason for sealing a note was to bring the instrument under the longer period of limitation sometimes provided for such cases.[11] And it is believed that the better policy, now

[6] *Quaere,* whether recovery might be had by such a person as the defendant, for services rendered under a contract. There is the question of illegality, in "practicing medicine" without a license; and there is perhaps a question whether an absent treatment would be good consideration.

[7] It may be observed in passing that most of us desire much more than freedom from interference in our thoughts and beliefs; we desire active protection in them, at the expense of other people. If I believe chiropractic efficacious, when you run over me I wish not only to be free to have a chiropractor treat me; I wish to have the damages cover his charge for his services. This has been allowed. *Cf.* (1919) 28 YALE LAW JOURNAL, 615. But it may be doubted whether the same rule would hold, of the price of one of the defendant's exorcizings.

[9] Sec. 6.

[10] *Cf.* 1 Daniel, *Nego. Instr.* (6th ed. 1913) sec. 32.

[11] 8 C. J. 111.

that the rules on consideration in negotiable paper have become settled for better or worse,[12] is not to threaten new confusion by allowing a seal to have this particular one of its common-law effects.[12a] Indeed, some sanction for such a view may even be squeezed from the inadvertent language of the act; for if a seal should foreclose the question of consideration the seal would decidedly "affect the *validity* of the instrument." At least, the act does *not* provide that validity shall be *effected* by the seal.

The reasoning of the court in *Dalrymple v. Randall, Gee and Mitchell Co.* (1919, Minn.) 174 N. W. 520 brings up again for discussion the conflict between common-law and the mercantile views on the sale of chattels. A sold to B a carload of grain; resales took place at once, to C, and then to D. All the parties were members of the Minneapolis Chamber of Commerce, and the sales took place under the rules of that organization: delivery to be made at the buyer's instructions, price to be subject to the state weigher's report; bill to be presented and payment made by two P. M. of the day of the weigher's report; and the whole transaction to be considered a "cash sale." B was insolvent; the issue came up between his trustee and A, to recover the proceeds of the grain, which C paid into court; the court properly held such proceeds to belong to A. By "cash sale" it seems clear that a sale was meant in which "title does not pass" until payment.[13] The general ruling in such cases is that delivery

[12] Viewed on its merits, as *res integra,* the doctrine that consideration is essential to the validity of a contract is not altogether satisfying, especially as regards negotiable paper. It is not found under the civil law, and its absence does not seem to greatly hinder the course of business. *Cf.* (1919) 28 YALE LAW JOURNAL, 621, esp. 640 ff. Of course no consideration is on the Continent necessary to the validity of a bill of exchange. Lorenzen, *Conflict of Laws Relating to Bills and Notes* (1919) 28. That our own *mores* require more promises to be enforceable than are covered by the current academic definition of consideration is proved by some of the developments in the law of trusts; by the pugnacious persistence of the sealed instrument; and especially by the steady extension of "consideration" to cover new sets of fact. So, e. g. the development of the looser estoppel concepts to require the "making-good" of promises—on which see Anson, *Contracts* (3d Am. ed. by Corbin, 1919) 124, n.—and (a situation which closely resembles an *ex post facto* specific performance) the "shutting of the mouth" of one who would set up a state of fact other than that on which his adversary is taken to have relied: for instance, in a suit by a conditional vendor against a subvendee, under acts requiring record of conditional sales. Ewart, *Estoppel* (1900) is suggestive and full of illlustration of the tendency.

[12a] So *Lacey v. Hutchinson* (1909) 5 Ga. App. 865, 64 S. E. 105. It will be remembered, however, that the N. I. L. has not been adopted in Georgia. The Georgia rule also conduces to uniformity, now that the law of sealed instruments has become so multiform by statutory change.

[13] The most notable phenomena of the "passing of title" are of course (1) that the seller can recover from the buyer the full purchase price, and cannot

before payment raises a presumption, and is itself evidence, that the seller waived the condition, and that title therefore has passed. But the question is one of fact; where it has been found that there was no such waiver, recovery has been allowed even from a subvendee, when the vendee had procured delivery by "payment" with a check later dishonored.[14] It is hard to agree with the policy behind such a recovery. It is hard to reconcile it with the law on fraudulent sales, or on vendors in possession, or even with the law on conditional sales at common law. At the worst, the vendee in a cash sale is after delivery in the position of a conditional vendee; but where a conditional vendee is "authorized to put the goods in his stock or otherwise make it seem that the goods are his," even he, though he "does not have title," has power to pass title to a *bona fide* purchaser for value;[15] the analogy to brokers and consignees, dealing in their own names with specific carloads of grain, seems hardly escapable. Such a doctrine would not in any way impugn the court's intimation in the principal case that an action for conversion would lie against C or D; for it might well be held that members of an exchange whose custom was to make sales after a certain manner cannot claim to have taken without notice of a prior vendor's rights. But should not a non-broker be protected, who had bought in good faith from B?

The injunction granted by Judge Anderson against the coal strike can hardly be said to have served a very fruitful purpose. Indeed,

---

recover, in the event of the buyer's insolvency, either the specific goods or their proceeds; and (2) that the seller cannot recover either the goods or their proceeds from a bona fide subvendee. (2), which may of course exist without (1), is primarily under consideration in the text.

[14] *National Bk. of Commerce, v. Chicago, etc. Ry.* (1890) 44 Minn. 224; 46 N. W. 342. The situation does not appear to be changed by the Uniform Sales Act, sec. 23. It is submitted that the common method of discussion of the courts, treating the question as one of fact, and making the decisive fact the actual intent of the parties that the condition be waived or be not waived, obscures the fundamental issue at stake. As between seller and buyer, intent may perhaps properly be made a crucial operative fact (though even here such a test presents embarrassing difficulties, as in the matter of mistake); but when the question is, whether a *bona fide* subvendee for value is to be protected against the vendor, the problem becomes wholly one of policy: under what states of fact are we going to protect such a purchaser? The seller's intent, of one kind or another—his willingness to let the buyer take possession of the goods, or mingle them with his stock, or resell them, or whatnot—may properly be one of these operative facts; but surely it is not the only one, nor always the most important; and that nothing necessarily follows from the mere fact that no title passed to the original buyer, is shown by the illlustrations in the text.

[15] Williston, *Sales* (1909) sec. 329; *cf.* also sec. 325. In sec. 346, the author argues strongly in favor of delivery under a cash sale, "with intent that the buyer may immediately use" the goods "as his own," concluding the seller, on the question of title, in the absence of pretty clear evidence showing an intention to reserve the title." Benjamin, *Sales* (7th Am. ed. 1899) 299f. and 1 Mechem, *Sales* (1901) secs. 552-7, do not discuss the policy involved.

so far as the public is concerned, far from producing any coal, the injunction itself seems to have embittered the miners to a point making the problem more difficult of solution and to have raised a political issue likely to trouble the country for some time to come. In England a more efficacious remedy is available in the action for a declaration of rights or declaratory judgment which, had it been available in the coal strike case, would have achieved all the useful results obtained by the injunction, namely, a decision that the strike was in violation of the Lever Act prohibiting limitation of production during the war, and would have avoided its irritating disadvantages. True it is that the Attorney General wished in this case not merely to have a determination that the law was being violated, but also desired to have coal produced, and therefore felt the need of specific relief. But it might have been surmised from experience that no injunction would compel the miners to dig coal. The final settlement of the strike has been brought about rather in spite of than because of it. It seems clear, therefore, that a declaratory action, apart from its other valuable uses, would have been a most desirable remedy to have available in the coal strike. It would have informed the miners that they were legally in the wrong, yet would not have carried with it any order such as was embodied in the injunction, or raised the political issues consequent thereon. A bill amending the Judicial Code, introduced by Senator Fletcher, to enable the Federal courts to render declaratory judgments, is now pending before the Senate Judiciary Committee. Possibly this illustration of its utility will stimulate the approval and passage of the bill. The legislatures of Michigan, Florida and New Jersey have recently empowered their courts to render declaratory judgments.[16]

Now and again the cleverness of a trick excites one almost to wish that it had succeeded. But it is gratifying to find the courts clear-sighted and equal to the trickster. In *Wintler Abstract and Loan Co. v. Sears* (1919, Wash.) 184 Pac. 309, what seems to be a novel point of chattel mortgage law was decided, and decided well. An abstract company had given the plaintiff a chattel mortgage on its plant, including its abstract books. When foreclosure proceedings were begun, the company proceeded to make photographic copies of its books and records, and after foreclosure sold the copies to the defendant, who took them with notice of all the facts. The plaintiff bought the original books in at the sale, started an abstract company, discovered competition,—and then sued to recover possession of the copies. Although in Washington such a mortgage gives only a lien on the chattels, the court held that the making and sale of the copies had been in viola-

[16] The remedy is exhaustively discussed by Professor Borchard in (1918) 28 YALE LAW JOURNAL, 1, 105.

tion of duty. "The same rule of law, which would permit a mortgagee to enjoin any act which would wholly or partially destroy the mortgaged property, should also permit him to enjoin any act which would wholly or partially destroy the value of that property." Such recognition that the value of the security lay largely in the right that the information contained in the books should remain secret, is altogether sound. The plaintiff failed, to be sure, in the particular action, because the foreclosure decree and the sheriff's bill of sale had given an itemized description of the chattels sold, and had failed to include the photographs among the items. But the court intimates very strongly that an action of another sort would be maintainable—"one to enjoin the use of such copies, or for their destruction, or a straight action for money damages;" perhaps, even, at the outset, a suit treating the copies as included within the mortgage. The latter suggestion would seem to indicate a novel and interesting extension of the law of accession; the former ones would certainly be sustainable under the existing rules on unfair competition.

There is a tradition that even great Jove sometimes nodded on his throne; small wonder if courts sometimes do the like. In *McClendon v. Heisinger* (1919, Calif. App.) 184 Pac. 52, a corporation had given a note to one of its directors; he procured the guaranty of his fellow-directors on the back of the note, promising them orally that he would stand his own share of any loss they might thereby incur. The note being unpaid at maturity, he brought suit on the guaranty. Recovery was allowed, of the full amount due on the note. The court reasoned that the parol evidence rule barred the defendants from showing the oral agreement to vary the terms of their written guaranty; that the oral agreement could not be used as a collateral contract because (although a mere promise of partial indemnity) it was a promise to pay the debt of another within the statute of frauds; and that even if such were not the case, the collateral contract was inadmissible as a counterclaim because, until judgment in the instant suit had been rendered and paid, the defendants would have no "existing" cause of action under the statute of the state. This last recalls the reasoning of Coke; it has not, in recent years, been thought good policy to force two law-suits to grow where one grew before. The case is in its day unique. *Requiescat oblitus in pace.*